**FORMS MARKETING SDN. BHD.**

**v.**

**SUPREME QBE INSURANCE BHD.**

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 1352 OF 1985]
26 FEBURARY 1987

***CIVIL PROCEDURE:*** *Appeal - Application for extension of time to appeal - Whether there are merits in the proposed appeal - Inordinate delay in making the application - Whether application should be allowed.*

This is an application for extension of time to appeal. Judgment was given to the plaintiffs by the Senior Assistant Registrar pursuant to an O. 14 application. The defendants failed to cause the relevant notice of appeal to issue within 5 days as prescribed by O. 56 r. 1(3). There was a delay of some 7 months before this application was taken out.

The main issues before the Court were:

(i) Whether there are merits in the proposed appeal; and

(ii) Whether there has been inordinate delay in making the application for extension of time.

**Held:**

On the peculiar facts and circumstances of this case, the justice of the matter calls for the application to be allowed because:

**[1]** The claim by the plaintiffs against the defendants appears to be *prima facie* misconceived as on the face of the policy, the assured and the insurers named in the policy are neither the plaintiffs nor the defendants.

**[2]** There was a reluctance on the part of both sides to inform the Court regarding the roles played by them that led to the policy being issued by QBE Insurance (International) Ltd.

**[3]** The explanation given by the defendants for the delay in filing the application was *bona fide*. However, there was no doubt that there has been inordinate delay in making the application for extension of time.

**[4]** Also, there was the unavoidable impression that the Senior Assistant Registrar's giving of summary judgment was erroneous.

*[Application allowed and defendants given 5 days from date of judgment to have Notice of Appeal issued. Costs to be paid by defendants in any event.]*

**Legislation referred to:**
Rules of the High Court 1980, O. 14, O. 56 r. 1(3)

*For the defendants/applicants - Rita Reddy; M/s. Shearn Delamore & Co.*
*For the plaintiffs/respondents - Tan Tuan Lin; M/s. Gurbakhash & Tan.*

**JUDGMENT**

**VC George J:**

The writ of summons was caused to be issued on 21 March 1985. By the statement of claim the plaintiffs *inter alia* contend:

(1) that they are the "consignees and owners" of 3 items of equipment (full particulars of which are given) "imported by their agents and shippers, one Safe & Security Systems Pte. Ltd."

(2) that the defendants were the insurers in respect of a policy of insurance that was "entered into by the defendants and the plaintiffs' said agents, Safe & Security Systems Pte. Ltd."

(3) that the equipment was so damaged as to be a total loss-the amount claimed however appears to be on the basis of total loss in respect of two of the items and partial loss in respect of the third.

Order 14 proceedings were taken out. This was opposed. The parties appeared by Counsel before the Senior Assistant Registrar who found for the plaintiffs. The defendants had filed a statement of defence. None of the averments by the statement of claim including the said three contentions were admitted. The defendants went on to state that even if there had been a policy of insurance it "expired" before the damage to the equipment had taken place.

Apparently at the O. 14 hearing before the Senior Assistant Registrar, counsel for the defence had pointed out that the policy of insurance on which the plaintiffs sued was that of a company called QBE Insurance (International) Ltd. of Singapore and not that of the defendants. The policy is Exhibit P1 to the affidavit filed in support of the O. 14 application. That policy indeed shows that the insurers are QBE Insurance (International) Ltd. and that it was issued at Singapore on 9 March 1984. The assured named in the policy is not the plaintiffs but one Messrs. Safe & Security Systems Pte. Ltd., Singapore. It also shows the plaintiffs to be the applicants of an airway bill "drawn under The United Malayan Banking Corporation Bhd., Kuala Lumpur main office documentary credit No. 840139." In the policy the only reference to the defendants is as follows: "claims payable by The QBE Supreme Bhd., Kaula Lumpur, Selangor, Malaysia. Claims payable in Kuala Lumpur irrespective of percentage."

In the face of the policy which clearly shows QBE Insurance (International) Ltd. to be the insurers and Safe & Security Systems Pte. Ltd. to be the insured, the claim by the plaintiffs against the defendants appears to me *prima facie* to be misconceived. Although the question of privity of contract was not taken up in the affidavit in opposition to the O. 14 application, it was certainly still open to Counsel at the hearing to refer to the policy that was exhibited by way of affidavit and to raise the point which according to Cik Rita Reddy of Counsel for the defendants was in fact done.

The plaintiffs' answer to that presumably is what is stated in the affidavit affirmed on 18 September 1986 by Encik Tan Tuan Lin of counsel for the plaintiffs. He first states that the defendants by their own admission are agents of a foreign principal. He then states that since the policy provides for the defendants to pay the amounts due on claims on the policy they are liable under the policy "which they themselves executed". (What was meant by that last phrase has not been explained). He finally states that in negotiations "the defendants held themselves out as having the authority and being the proper party" and that therefore they are estopped from claiming that they are not.

In the face of the policy and the paucity of material before her the learned Senior Assistant Registrar should have dismissed the application for O. 14. It seems obvious that both the plaintiffs and the defendants had played significant roles in transactions that lead to the policy of insurance being issued by the QBE Insurance (International) Ltd. but it seems to me that both sides have been reluctant to inform the Court what exactly were those roles. The least that the Court should be provided in an O. 14 application are the full facts.

Accordingly, in my judgment there are merits in the proposed appeal.

However the defendants did not cause the relevant notice of appeal to issue within the 5 days prescribed for that purpose by O. 56 r. 1(3). There was a delay of some 7 months before they took out the application now before me for extension of time to appeal. The explanation given for not having appealed in time and for the delay in applying for extension of time is in paragraph 8 of the affidavit in support of the application encl. (11). Again there is seen some reluctance to come out with the full story. Reading between the lines the impression I get is that the defendants are some sort of agents of QBE Insurance (International) Ltd. who appear to have some authority to deal with and if necessary to pay off claims made on their principals. It would seem that they filed a defence in the hope of keeping the matter going while they took instructions from their principals and at that stage or some time after the O. 14 judgment was entered referred the matter to their principals for instructions. The principals in turn referred the matter to their solicitors in Singapore who presumably gave advice to their clients in Singapore who in turn gave advice to the defendants in Kuala Lumpur who then gave instructions to their solicitors in Kuala Lumpur. I get the impression that the explanation given in *bona fide*. However there is no doubt that there has been inordinate delay in making the application for extension of time. But against that is the unavoidable impression that the Senior Assistant Registrar's decision giving summary judgment was erroneous.

In the circumstances I have, after considerable thought, come to the conclusion that on the peculiar facts and circumstances of this case the justice of the matter calls for my allowing the application. The defendants are given 5 days from the date hereof to have the notice of appeal issued. Costs of and incidental to this application shall be paid by the defendants in any event.

Also found at [1987] 1 CLJ 584